Völkerrechtsblog
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INTERVIEW

Insights from the Practitioner of International Law

KATRIN KOHOUTEK — 8 October, 2014

Professor James Crawford is not only the Special Rapporteur of the Draft Articles on State Responsibility, but has extensive experience as counsel in international litigation. Thus talking to him is a great opportunity to get some insight on international law in practice. This interview was conducted after he gave a keynote address on the "Unfolding of International Law since 1914" to celebrate the 100th Anniversary of the Walther Schücking Institute on 19 September 2014:

Why did you decide to become an international lawyer?

I was born in Adelaide, at the time a fairly small town in Australia. I enjoyed doing law as such and opted in Oxford for a thesis on international law, as I was very interested in international affairs. It was the time of Vietnam and I wanted to contribute to the controversies about that. International law also made me more mobile as I didn't envisage living in Adelaide for the rest of my life.

International law gave me the option to study a tricky and difficult area which was and still is underdeveloped. At the same time I hoped to work as a practicing international lawyer. I like cases and I like the strategy involved in litigation. Had I grown up in a big city I might have become a trial lawyer rather than an academic. But the combination of academic work and practice appealed to me. I didn't realize it would be as possible as it proved to be, as there was much less practice in international back then. But in my life-time the practice has increased and that proved to be a great advantage.

Which moments of your career do you regard as most important?

If I had to pick one moment it would be the conclusion of Draft Articles on State Responsibility in 2001. As Special Rapporteur I had four years to revise those articles and with other members of the International Law Commission we managed to achieve that. There have been cases that have been extremely interesting, especially the Wall Advisory Opinion, which I would perhaps choose as the second most interesting moment of my career.

You are working as a scholar, as a practitioner and as a political adviser. Do you perceive international law differently in the various roles you are working in?

It is always the same subject. International law provides a common language in which you talk to politicians, government officials or the private sector on subjects of concern to them. But it has become more relevant due to the ongoing integration of the world. The idea that people have rights under international law has expanded considerably. International law started with the idea of the rights of peoples and states: the idea of entitlement that has always been there. At the moment within the system of international relations it is the only established normative system we have. And that makes it intensely interesting, as it also forms the new frontiers we have to deal with.

Does your theoretical work influence your work as a practitioner in front of the ICJ?

Certainly! Of course there are differences. As a scholar you have to make sure whether you have taken into account all relevant material before you make your argument. When engaged in practice you have to work the other way around, namely starting with the result you want and searching for the arguments supporting that result. You should not do that when writing a paper. Furthermore, litigation means you have to design a case in order to achieve the outcome you want. You have to have this outcome in mind from the beginning, when you start working on the case.

In order to be successful, you have to present your case and your arguments in a way that appeals to the judges. But on the other hand, scientific writing should be presented in an

interesting way, too. So there is not much difference in that regard. However, in litigation we are much more concerned with the primary sources of public international law, treaties, doctrines and especially the cases of the ICJ and less with the writing of scholars. In both cases a text should be persuasive and clearly structured.

Is it more interested to represent the applicant or the respondent in international litigation?

In cases of a special agreement like in the Gabčikovo-Nagymaros Case there is no applicant or respondent. Then there is no particular advantage in being the first or the second party. Each side has to prove its case.

In other circumstances people approach you with a problem and you start a case in order to resolve that problem. For example the Faroe Islands wanted to get rid of EU sanctions regarding Atlanto-Scandian Herring. We started proceedings against the EU both under the WTO and under the UNCLOS. The case was designed very quickly, within a week. That was great fun. And both cases have now settled with the sanctions being dropped.

But there are also cases where you are respondent, where you are called on to resolve a situation created by politicians, perhaps without much regard to the relevant treaty provisions. There are challenging aspects in both sides. In investment arbitration it is similar. I like the combination of both.

When you are representing the applicant, how big is your influence in designing the exact content of the application?

If you are working with small countries, which I have done quite often, the domestic team is often quite small. The local team of the Faroe Islands consisted only of two members, a lawyer and a scientist. On the other hand such countries can develop an expertise, too: Costa Rica, for example, developed a strong domestic capacity over the time I was working with them. I have worked for Costa Rica in four cases, both on the applicant and on the respondent side. In such serial litigation the domestic team becomes more experienced. It is important to maintain a consistent team during the whole case, which can take up to five years in front of the ICJ. The foreign ministries of the country concerned usually recognize the growing skills of the team members and give them the opportunity to be further involved in litigation of a similar character.

What has been the most challenging case that you have been involved with?

The most challenging case was the Gabčikovo-Nagymaros Case, as it was the first time I had led a case in the Court. It was more difficult in that I was involved only in the litigation and not in the previous dispute. I was retained the day after the conclusion of the Special Agreement, which from a Hungarian point of view presented certain problems. The result of the case was acceptable and in some respects even better than might have been expected..

Do you think that the legal background of a judge at the ICJ should make a difference in his/her work?

I think it is inevitable as we all come from a particular background, one we are formed by. This includes not only experiences in our home country but also the implicit political

preferences of our home country. This is balanced through the representation of all major jurisdictions in the rather big bench of the ICJ. Representation in that regard does not mean that they take instructions. It rather says that they have a certain understanding of society and the role of law.

Is the ICJ influenced by politics?

I think the Court has a sense of what will be a broadly acceptable outcome in a case. I think that is true for all senior courts. Within limits it's inevitable and you have to accept that. On the other hand it is not a court of general equity. It has to achieve a result in accordance with the law. There is also a tension between the political pressures to produce a satisfactory outcome and the application of the law. A recent example was the Chile Peru Case, where I think the law was relatively clear and dictated a maritime boundary along a parallel of latitude. The Court followed that line for 80 miles and then moved it. The reasons for this seemed unsatisfactory for me as counsel for Chile. But it must be said that the outcome was acceptable for both states involved and in that sense it was suitable.

What are you doing in order to get elected as a judge of the ICJ in the upcoming round? Is there an election campaign and how does it look alike?

Yes, there is an election campaign. It is quite difficult for smaller countries in the Western European Group to run for the court. Usually there is quite a lot of competition since the United States, Great Britain and France always have a judge. That leaves only two seats open for candidates from other WEOG countries. Germany has been represented on the Court for quite a long time and Italy has been represented for quite a

long time, too. In my campaign Sir Kenneth Keith's end of term made one seat vacant.

Most of the actual work has been done by the Australian Foreign Ministry: They write notes and they make representations to other countries. One has to go New York to meet the State Representatives of the 6th Committee. That is a major aspect of the campaign. So you spent quite some time in the delegates lounge at the United Nations in New York. Then you have to involve the members of the National Groups of the PCA, who are the actual nominating bodies.

How much weight is given to the number of national groups that support a nominee? You have been supported by 27 groups, but some of them supported not only you, but other candidates, too.

You only need one to be nominated. But 27 groups handed in their nomination for me on time. That indicated wide support from European countries, as well as support from other regions: Asia, North America, North Africa and Central Europe. I was really encouraged by that.

Yesterday the Scottish people voted against independence, but there are still several small regions in Europe that strive for autonomy. Do you think that public international law can provide a solution to this challenge?

International law can only help to a limited degree. If there are secessionist or separatist tendencies in a state you have a political problem within that state. International lawyers can point out the difficulties of independence. There may be situations in which independence is really the only

alternative, as has been the case in Kosovo and also in South Sudan.

With regard to the Scottish independence: The idea that Scotland would fit naturally into a new place in the international arena as an EU member and an UN member with all its problems resolved was implausible. Scotland would not have automatically have become an EU member. The EU was certainly not of that opinion. Had there been a yes vote Scotland would have become a member of the EU, but that would have taken some time. It also would have necessitated a lot of negotiation on the details. International lawyers can point out the problems of independence and sometimes its advantages. But independence itself remains a political question.

Are states losing importance as actors of international law in view of these separatist tendencies and the growing importance of non-state actors?

They do to a certain degree. International law can cope with various forms of statehood, for example it can deal with federal states and monolithic states. There are other examples of special entities fitting into the system of international law without being a state: I'm sorry that the case of the Faroe Islands was not litigated, as we would have learned something about the position of small semi-autonomous entities within Europe. There are other examples of entities with special features: Taiwan also fits into the international system without being a state but having special rights. Even though statehood is under pressure, it is still a key concept of international law. I fear that we might erode states too much because states are one of the few political organizations that link individual human communities with each other through

structures which last across time. Besides they are capable of reform from within. States are still the principal repositories of authority in the international system and we tend to forget that.

Yesterday you talked about the unfolding of international law since 1914. Could you sum up your lecture for our readers?

I spoke about old wine in new bottles: We have a number of features in the international system which are genuinely new: We never had a standing international criminal court or a standing international prosecutor before. We never had a functioning world trade organization as we have now, despite earlier attempts. We never had such an elaborate international human rights system with individual complaints, etc. These things are organizationally new. Yet, some of the old questions come back and we still have to learn from history in dealing with these things. For example, the relationship between treaty and contract in bilateral investment treaty arbitration is deemed to be a new problem, but it is not: There is the important precedent of the Venezuela arbitration of 1903 that was dealing exactly with this problem and gave some very sensible answers to it.

Developments in the human rights area are similar: Human rights are rights of the individual against the state. There are tendencies to treat human rights as a completely separate field of international law and I think it is a very bad idea. Human rights are guarantees of proper conduct of a state, but they are not a system of uniform law as they don't tell a state how to behave. For example the Görgülü case of the Federal Constitutional Court of Germany shows us that on the one hand there is a right of due process for the natural parents of

an adopted child, but that on the other hand there is the value of the child's best interests. It's not the function of human rights to prescribe whether a state's family law should support the relationship of an adopted child to its recent family or favor the relationship to the children's natural parents. There are tendencies especially at the European Court of Human Rights to take human rights to the next level and say that there is one best way of doing something. I don't think that is the function of human rights treaties except in respect to some fundamental things like torture, inhuman and degrading treatment and the death penalty.

In dealing with human rights cases you always have to ask how the law should be implemented and what should be the result. For example it was discriminatory to name children always after the father. But human rights courts only can state what is not compatible with human rights law. They cannot order a certain system. There has to be a margin of appreciation that the society of a certain state has to determine.

So do you regard human rights as boundaries of state conduct and not as obligations of a certain result?

That obviously depends on the importance of the human right at stake. But I think there is a balance in human rights between the legitimate policy preferences of the community concerned, provided they have been democratically expressed, and the rights of the individuals. I don't think it is for human rights judges to govern societies; the concerned societies should do that.

I do not want to give the impression of being against human rights. I think that human rights are one of the most

important developments in international law. Human rights issues bring us back to the limits of state authority and the legitimacy of state decisions. And these are again old questions. That is what I tried to convey yesterday.

What is the most important development of public international since 1914?

Human rights law is certainly one of the top three. But the eradication of large scale war between societies is the number one priority and the question is whether this is going to be preserved. Some of the tendencies we see at present are very worrying. People are still being killed in wars, but since 1945 the number of people being killed in wars is very much less than it was from 1914-1945. Poland lost 30 % of its population in the Second World War. That does not happen anymore. The international death rate, as I call it, has declined dramatically. And even though it is important to focus on catastrophes like the Syrian, it is a very important development that most communities do not fight each other. This cannot be underestimated. Sometime I get clients who are very upset about a particular subject and claim that international law is not helping them to solve the problem. I point out to them that a war would not help them either. They usually accept that. The idea of having a war between two established states is now regarded as highly regressive. So we got rid of the idea that war is an acceptable procedure. This development is not only one of international law but international law has contributed to it.

The other important development would be the abolition of the idea that individual leaders of states have impunity in respect of their conduct. The ICC is going through a very difficult teething period. Even though it is a difficult environment there

is now less respect for the idea that government leaders might enjoy impunity in respect of the most serious crimes. This is now only established as a principle and not yet fully operational, but steps have been taken to make it operational and I am curious what will happen in the next generation.

What do you think is the most pressing challenge that international law faces today?

The challenge now and always is to make international law self-effective in situations of outright opposition. The present policy of the Russian Government is rather problematic, in the Ukraine and elsewhere. To be fair they have been provoked in some respects. But what is going on is nonetheless unacceptable. It needs to be stopped and international law is not very good at that. International law is good at keeping situations alive but it is not very good at moving on and resolving them.

If you could write down your perfect version of international law, how would it look like?

I don't know how it would look like as we don't have a constitutionalised international society. International law is a system of adjustment to maintain order in the absence of a constitutionalized society. The merits of a constitutionalized society are only obvious when you don't live in one. How we can constitutionalize international society is a problem we have not yet solved, not even the greatest thinkers in history. Kant spent some time troubled about it but unable to produce solutions and Hegel gave up on solutions. We are trying to find them again through a process of adjustment. International law is a means of facilitating the constitutionalization of societies

from within. That would be the theme and the purpose of „my" international law.

What will international law look like in the future?

It will look like today except for some adjustments. I don't envisage a wholesale change. There might be some further developments in dispute settlement. Governments have got used to litigation as a method of indicating rights. That is on balance a hopeful sign. The cases may just solve a particular issue but they can open a framework to governments and diplomacy to solve the problems they deal with.

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